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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.S., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.S., Defendant and Appellant.	E064565 (Super.Ct.No. RIJ1500593) OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson, Judge. Affirmed.

Joanne D. Willis Newton, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Following a combined jurisdiction/disposition hearing, the juvenile court adjudged A.S. a dependent of the court (Welf. & Inst. Code,[1] § 300, subd. (b)), removed him from his parents' custody, and denied defendant and appellant J.S. (father) reunification services (§ 361.5, subds. (b)(10), (b)(11)). Father appeals. He contends: (1) the court violated the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) when it summarily denied him reunification services; and (2) the summary denial of services amounts to an abuse of discretion. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

On June 12, 2015, the Department of Public Social Services (Department) filed a petition under section 300 as to A.S., who was born testing positive for amphetamines, barbiturates, benzodiazepines, cocaine metabolites, marijuana metabolites, and opiates. Father claimed Osage Indian ancestry; however, he was not a registered member of the tribe. The Osage tribe had previously found that another of father's children was not "ICWA eligible." Father refused to submit to a drug test, admitting that he would test positive for marijuana. He disclosed that he had entered multiple substance abuse programs in the past but he did not complete any of them. Father had lost custody of two older children in two prior juvenile dependency cases: S.S. in early 2012, and E. S. in June 2013. In S.S.'s case, father had received reunification services in 2011 and 2012.

On June 15, 2015, A.S. was detained, and the juvenile court found that ICWA may apply. An amended petition was filed on July 20, 2015, indicating that father was

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

incarcerated. Father informed the social worker that his release date was December 16, 2015. The Department recommended that services be denied to father, pursuant to section 361.5, subdivisions (a), (b)(10), and (b)(11).

On July 23, 2015, the juvenile court authorized visitation with father at his place of incarceration in accordance with "institutional rules" (through glass), and that father participate in all available services while in custody, including a correspondence parenting course. That same day, the Osage Nation tribe filed its notice of intervention in the dependency case.

The addendum report for the contested jurisdiction/disposition hearing was filed on August 24, 2015. The report noted that on August 6, 2015, the social worker sent two separate letters to father. The first letter included a parenting packet, business card with cell phone number, and an inmate services matrix. Father was advised to complete the packet and mail it back to the social worker. He was encouraged to take advantage of any services offered through the jail, such as parenting education and anger management. He was further advised to seek further services should he be released from custody. The second letter included photographs of A.S. and a request for father to call the social worker to discuss visitation. The addendum report further stated that the social worker had contacted a counselor in the jail concerning enrolling father in the Residential Substance Abuse Treatment Program (RSAT). A referral was submitted.

From July 29 through August 24, 2015, the social worker made several unsuccessful attempts to contact the Tribal social worker to discuss case details and obtain an Indian Expert Declaration. On September 3, 2015, A.S. was moved from his

foster home and placed with the maternal aunt and uncle. On September 22, 2015, the Department received the ICWA Affidavit of Qualified Expert Witness from the Osage Nation.

The contested jurisdiction/disposition hearing was held on September 29, 2015. Jessica Hargrove, an employee of the Osage Nation, testified. She investigated allegations of abuse and neglect involving Osage children and provided expert testimony. She found that father had been provided active efforts and remedial services and rehabilitative programs. She did not make recommendations regarding services. Rather, the tribe's permanency workers typically look at the issue of whether services should be provided. She testified that father should receive services and that there were active efforts with him.

Following argument, the juvenile court found the allegations in the amended petition to be true. A.S. was adjudged a dependent of the court and removed from his parents' care. The court denied reunification services to father under section 361.5, subdivisions (b)(10) and (b)(11); however, the court ordered services for mother. The court stated: "And so father, even though I'm not extending services through the Department, you are in a program that is a very good program. If you take full advantage of RSAT, you will come out sober, and you will come out far ahead of when you went in. You're going to have to decide to stay with the lessons and the sobriety that RSAT can help with you. . . . [¶] And then I'll look at a [section 388] motion later down the road."

II. DISCUSSION

A. The Court Did Not Violate ICWA By Denying Reunification Services.

Under section 361.5, subdivision (b),[2] the court need not provide a parent with reunification services for various reasons, including the following: The parent has failed to reunify with a sibling or half sibling and has failed to make a reasonable effort to treat the problems leading to that sibling or half sibling's initial removal, and the parent has had his parental rights over a sibling or half sibling terminated and has failed to make a reasonable effort to treat the problems leading to the removal. (§ 361.5, subds. (b)(10), (b)(11); see *In re Albert T.* (2006) 144 Cal.App.4th 207, 217.)

"While California law strives to preserve or reunify families whenever possible, the Legislature has recognized 'that it may be fruitless to provide reunification services under certain circumstances.' [Citation.]" (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1015-1016 (*Letitia V.)*.) Father claims that by denying him reunification services under section 361.5, subdivisions (b)(10) and (b)(11), the juvenile

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[2] "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian. [¶] (11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent." (§ 361.5.)

court violated ICWA, which provides: "Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (25 U.S.C. § 1912(d), italics added.) Thus, he contends there is an apparent conflict between the reunification services exceptions found in section 361.5, subdivision (b), and the "active efforts" finding required by ICWA.

Father acknowledges that this issue was addressed and rejected in *Letitia V.*, and that the juvenile court expressly cited to *Letitia V.* as the "sole basis" for its denial of reunification services to him. However, he contends that *Letitia V.* is distinguishable from the case at hand, and it is no longer good law.

Father distinguishes his case from that in *Letitia V.* by pointing to the time that passed between receipt of services and denial of new services, the services received, and the parent's continued use of drugs. Specifically, he notes that the mother in *Letitia V.* was denied services to her child just 16 months after her previous services had terminated. However, in his case, he had last received services in 2011 and 2012, three and a half years prior to the denial of services in this case. Next, he notes that the parent in *Letitia V.* received a solid year of services, along with years of informal services, both of which were detailed, while father received only six months of services, and there was no evidence as to what services were provided in the first dependency case, or any information about father's current reunification efforts. Finally, he emphasizes the evidence of his progress on his case plan, as opposed to the parent in *Letitia V.*, who

never stopped using drugs or visited her child. Father argues that "the case history at hand does not clearly establish that offering reunification services to the father would be an exercise in futility."

The fact that father had been away from the juvenile system longer than the parent in *Letitia V.* is irrelevant. Father had been provided services to alleviate his substance abuse issue, but failed to succeed. After losing custody of S.S. in 2012, he continued using drugs and lost custody of another child one year later. In 2015, when A.S. was detained, father's situation remained the same—he was still using drugs. As for father's receipt of only six months of services, the fact remains that shortly after A.S.'s detention, father was incarcerated. Services were provided to father during his incarceration, including a residential treatment program. Between his history of substance abuse and inability to remain out of jail, the Department was limited in what services were available to father. As for father's progress on his case plan, father admitted entering multiple substance abuse programs in the past, but he did not complete them.[3] This admission suggests that any success in his most recent program is attributable solely to his incarceration. As the trial court noted, father's situation was a pattern that kept repeating "over and over in the last four years." His case is not distinguishable from that in *Letitia V.*

[3] "When asked which substance abuse programs he attended he stated, 'Then I would have to tell you where I went and why I left and I don't want you to use it against me that I didn't complete the program.'"

Relying on section 361.7, subdivisions (a) and (b),[4] and the new ICWA guidelines for state courts (U.S. Dept. of the Interior, Bureau of Indian Affairs (BIA) Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed.Reg. 10146-10159 (Feb. 25, 2015) (Guidelines)), father argues that the law relating to ICWA has changed significantly in California since 2000 when *Letitia V.* was decided. We disagree.

Father argues that section 361.7, subdivision (a), which requires a finding of active efforts, applies "notwithstanding" section 361.5, a statute that permits bypass of services in enumerated circumstances.

Following enactment of section 361.7, this court in *In re K.B.* (2009) 173 Cal.App.4th 1275 (*K.B.*), held that ICWA does not prevent denial of services where bypass provisions apply. In *K.B.*, the father had committed a violent felony but argued that section 361.7, subdivision (a), required provision of services. We discussed *Letitia V.* and contrasted the facts to *Letitia V.*, noting that the father had never been offered services but found that doing so would nonetheless be an idle act since he was a registered sex offender for a prior conviction for lewd acts on a child and had reoffended with the half sibling in the current case. (*K.B.*, *supra*, at pp. 1283-1284, 1287-1288.)

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[4] "(a) Notwithstanding Section 361.5, a party seeking an involuntary foster care placement of, or termination of parental rights over, an Indian child shall provide evidence to the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [¶] (b) What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers." (§ 361.7, subds. (a), (b).)

Whether prior efforts have failed or current circumstances demonstrate the futility of providing services, ICWA does not require active efforts[5] in every case. Contrary to father's argument, the goal of ICWA is to avoid the breakup of an Indian family "whenever possible," not to force Indian children to remain in the limbo of temporary placement while ineffective efforts are made to attempt to encourage unwilling parents to change their entrenched habits. (*Letitia V.*, *supra*, 81 Cal.App.4th at p. 1016.) Nothing in section 361.7, subdivision (a), changed this. More importantly, section 361.7 applies when a party seeks to terminate parental rights over an Indian child. We are not at the termination stage as noted by the juvenile court's comment to father that if he takes advantage of RSAT and sobers up, the court will entertain a section 388 motion "down the road."[6]

Notwithstanding the above, father contends that the appropriate standard for denial of services is absurdity, not futility. (*Church of the Holy Trinity v. United States* (1892) 143 U.S. 457, 460 ["If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."].) In other words, he argues that only when it would be absurd for the Department to provide a parent with active efforts should services be denied. His examples include: when the parent refuses "to do services or has

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[5] "Although the phrase 'active efforts' is not defined by either federal or state statute, California courts have construed 'active efforts' to be 'essentially equivalent to reasonable efforts to provide or offer reunification services in a non-ICWA case . . . .' [Citations.]" (*In re C.B.* (2010) 190 Cal.App.4th 102, 134.)

[6] The two prongs established in section 361.7, subdivision (a), providing active efforts and those efforts proving unsuccessful, do not come into play at this stage of the dependency proceedings.

expressed a clear intent not to be involved in the case *despite active efforts to engage them prior to disposition*, the parent suffers from a severe disability that makes it impossible for them to engage in and benefit from services, or the abuse or neglect leading to removal is of such a severe nature that it is clear that there are no services that could be provided to the offending parent that could possibly remedy the situation." (Original italics.)

We reject the "absurd" standard. The language in the statute is clear. Services must be provided to parents unless, inter alia, a parent has failed to reunify with a sibling or half sibling and had his parental rights to the same sibling or half sibling terminated, and failed to make a reasonable effort to treat the problems leading to that sibling or half sibling's removal. (§ 361.5, subds. (a), (b)(10) and (b)(11).) In deciding to deny services, the juvenile court need only find by clear and convincing evidence that any of the identified situations exist. (§ 361.5, subd. (b).) On appeal, we review an order denying services for substantial evidence. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) The record contains substantial evidence to support the court's decision.

Acknowledging this court's affirmance of the holding in *Letitia V.* (*K.B.*, *supra*, 173 Cal.App.4th at p. 1284), father contends that since these decisions, new Guidelines have been enacted which clarify that "'active efforts' are separate and distinct from requirements" for states to qualify for federal foster care and adoption assistance under the Social Security Act. (Guidelines, 80 Fed.Reg., *supra*, at pp. 10150-10151.) He argues that the new Guidelines direct state courts to provide reunification services in

ICWA cases even when otherwise federally permissible exceptions to reunification services exist. We disagree.

The new Guidelines are consistent with statutes and rules of court from this state, and are not binding authority. (*In re A.L.* (2015) 243 Cal.App.4th 628, 638; *In re W.B.* (2012) 55 Cal.4th 30, 51-52, fn. 9 [Guidelines "are instructive but not determinative of state court decisions."].) As our colleagues in Division One of this District recently held, "[e]ven in light of the new guidelines information, the general principle still applies, that '[t]he adequacy of reunification plans and the reasonable of [the Department's] efforts are judged according to the circumstances of each case.' [Citation.]" (*In re A.C.* (2015) 239 Cal.App.4th 641, 657.) As discussed, to satisfy ICWA and California's corresponding requirements the Department "'must make a good faith effort to develop and implement a family reunification plan. [Citation.] "[T]he record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult . . . ."' [Citation.]" (*In re A.C.*, *supra*, at p. 657.) As discussed in the next section, such showing was made.

For the foregoing reasons, we conclude that the *Letitia V.* remains good law.

B. The Court Did Not Abuse Its Discretion in Summarily Denying Reunification Services.

Father asserts the juvenile court abused its discretion in summarily denying reunification services under section 361.5, subdivision (b), which should be narrowly

applied. He notes that he completed a parenting course by correspondence, had enrolled in a treatment program, and his mother was available as a resource to facility visitation. This evidence, father argues, "suggests that despite [his] history of neglect of his two older children, there is a reasonable basis to conclude that his relationship with [A.S.] can be saved."

There is no abuse of discretion because the evidence supports the juvenile court's decision. There were prior dependency proceedings involving father's older children: S.S. in early 2012 and E.S. in June 2013. In S.S.'s case, father's services were previously terminated and ultimately his parental rights were terminated. He had received those services in 2011 and 2012. When A.S. was detained, father's situation was similar to his situation during S.S.'s dependency. Father had a substance abuse problem that caused him to neglect his two older children. Father abused substances and was in custody during the dependency of both older children. Father continued to abuse substances after A.S. was born, and he was again incarcerated and unable to provide care and support for A.S. Father admitted that he had entered multiple substance abuse programs in the past but had not completed any of them. In short, father failed to make a reasonable effort to treat the problems that led to the removal of his older children. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 912-915.)

Nor has father satisfied his burden of establishing that it was in A.S.'s best interest for him to receive reunification services. When the prerequisites of section 361.5, subdivision (b) are met, the court "shall not" order reunification services for the parent unless it "finds, by clear and convincing evidence, that reunification is in the best interest

of the child." (§ 361.5, subd. (c).[7]) Thus, "'"[o]nce it is determined one of the situations outlined in [section 361.5,] subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]'" [Citation.] The burden is on the parent to change that assumption and show that reunification would serve the best interests of the child." (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) Father did not demonstrate reunification was in A.S.'s best interest.[8]

Father's situation is precisely the situation that section 361.5, subdivision (b) seeks to address. Thus, the juvenile court acted appropriately in summarily denying reunification services under section 361.5, subdivision (b).

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[7] "In deciding whether to order reunification in any case in which this section applies, the court shall hold a dispositional hearing. The social worker shall prepare a report that discusses whether reunification services shall be provided. . . . [¶] . . . [¶] The court shall not order reunification for a parent or guardian described in paragraph . . . (10), (11) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c).)

[8] Father was in a program while in custody. As the juvenile court observed, assuming he takes full advantage of the program and remains sober after being released, father may seek a modification of the disposition order and show that reunification is in A.S.'s best interests.

III. DISPOSITION

The order is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

SLOUGH
J.